



Response to the
ACT Greens Discussion Paper: Consent in
Sexual Violence Laws

March 2018

About ACTCOSS

ACTCOSS acknowledges Canberra has been built on the land of the Ngunnawal people. We pay respects to their Elders and recognise the strength and resilience of Aboriginal and Torres Strait Islander peoples. We celebrate Aboriginal and Torres Strait Islander cultures and ongoing contribution to the ACT community.

The ACT Council of Social Service Inc. (ACTCOSS) is the peak representative body for not-for-profit community organisations, people living with disadvantage and low-income citizens of the Territory.

ACTCOSS is a member of the nationwide COSS network, made up of each of the state and territory Councils and the national body, the Australian Council of Social Service (ACOSS).

ACTCOSS' vision is to live in a fair and equitable community that respects and values diversity, human rights and sustainability and promotes justice, equity, reconciliation and social inclusion.

The membership of the Council includes the majority of community based service providers in the social welfare area, a range of community associations and networks, self-help and consumer groups and interested individuals.

ACTCOSS advises that this document may be publicly distributed, including by placing a copy on our website.

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Table of contents

Acronyms	4
Introduction	5
The need for affirmative consent	5
Recommendations	6
Include examples in the Explanatory Statement	6
Education for police and others within the justice system	6
Community education and resources.....	7

Acronyms

ACTCOSS	ACT Council of Social Service Inc.
ANU	Australian National University
CALD	Culturally and Linguistically Diverse
FPDA	First Peoples Disability Network
PWDA	People With Disabilities Australia
SHFPACT	Sexual Health and Family Planning ACT
WWDA	Women With Disabilities Australia

Introduction

The ACT Council of Social Service Inc. (ACTCOSS) supports the proposal to reform the ACT's criminal law to adopt a new definition of consent. ACTCOSS believes it is imperative the ACT adopt an affirmative model of consent, which is a more victim/survivor-responsive approach to prosecuting sexual violence. The following response outlines our support for the proposed amendments, and a series of recommendations regarding further work to enhance the protections an affirmative model of consent affords.

ACTCOSS has previously advocated for greater attention to sexual violence in the ACT. In our submission to the *Standing Committee on Justice and Community Safety Inquiry into Domestic and Family Violence - Policy approaches and responses* last year, we noted:

...it is important to ensure this focus on domestic and family violence is complemented by specific work to progress implementation of recommendations from the Evaluation of the ACT Sexual Assault Reform Program and continuing to build community understanding of the complexities of sexual violence, how to prevent sexual violence and better meet the needs of survivors.

The recent report into sexual assault at universities resulted in particularly high results from the Australian National University. Both the victims/survivors and the perpetrators in these events are members of the Canberra community. Although the ANU is a national institution, the ACT Government should actively respond to the survey results with scope to consider that the results might be indicative of levels of sexual assault in the community more broadly.

Finally, as noted in the Women's Services Network submission, the Canberra Rape Crisis Centre has reported increasing and substantial growth in demand over the past few years.

We therefore commend the ACT Greens for discussing sexual violence in the ACT, and agree that successful implementation of these laws, combined with effective community education, is important at a legal and conceptual level, "in giving the community an understanding of what consent and assault are, and hopefully preventing those cases occurring in the first place".¹

The need for affirmative consent

Sexual assault is a difficult issue for the justice system. This is in part due to society and community shame and silence around sexual violence. Victims/survivors often do not report, and sexual violence statistics often misrepresent actual rates in the community, which are generally higher. Non-reporting is also due to the actual and perceived difficulty of prosecution. Access to legal justice is often considered out of reach for victims/survivors, as determining guilt or innocence rests on the word of the accused against the

¹ ACT Greens Discussion Paper: Consent in Sexual Violence Laws, p. 4.

victim/survivor. Accessing legal justice can often be re-traumatising for victims/survivors.²

The ACT's current consent laws do not have an affirmative model of consent, instead the legislation simply names factors that negate consent. As such, the onus is on the victim/survivor to prove that they *did not* consent (i.e. through verbal or physical resistance), rather than that they *did*. Without a 'yes means yes' model, ACT legislation does not protect victims/survivors who may have felt too unsafe or unable to express non-consent.

It is also important the ACT brings its legislation in line with other states and territories. We have a transient community, including many students and workers from interstate. Updating our consent legislation to be as protective as other states and territories will help safeguard the rights of these people. There is no reason someone who lives in Queanbeyan and works in Canberra should be afforded different protections at work and at home. The Australian Institute of Health and Welfare recently noted that one of the main challenges to discussing family, domestic and sexual violence in Australia is that there is "no consistent definition for family, domestic and sexual violence".³

In preparing this letter, ACTCOSS consulted with the Women's Centre for Health Matters and the Youth Coalition of the ACT, whose submissions we support. ACTCOSS also thanks Sexual Health and Family Planning ACT (SHFPACT), the ANU Women's Department and Legal Aid ACT for their advice.

Recommendations

Include examples in the Explanatory Statement

As mentioned, ACTCOSS broadly supports the proposed updates to the ACT consent in sexual violence laws, but we believe the Explanatory Statement could be amended to clarify the importance of adopting an affirmative consent model. This could involve including examples of sexual violence cases that would not result in prosecution under current laws, such as 'rape freeze', and other instances wherein a victim/survivor neither says no nor yes.

Education for police and others within the justice system

Changes to sexual violence legislation must be accompanied by immediate and comprehensive education for police and others within the justice system. Police are often the first responders to victims/survivors pursuing legal justice, and their conduct and response can influence the course of action. As noted in the *Evaluation of the ACT Sexual Assault Reform Program*, from 2008-2010 the

2 Evaluation of the ACT Sexual Assault Reform Program: Final Report, p. 42.

3 Australian Institute of Health and Welfare, *Family, domestic and sexual violence in Australia*, AIHW, 2018, Canberra, p. 101.

most common causes of attrition at the point of police investigation were insufficient evidence (31.1%) and the victim/survivor withdrawing the complaint (26.6%).⁴ In addition, the report states:

...law enforcement, the DPP and the victim support agencies consulted for [the] study recognised that the ways in which they attempt to assist victim/survivors can often conflict, even though these agencies all aim to give the victim/survivor the best outcome.⁵

Police and others within the justice system must therefore receive comprehensive education if the Crimes (Consent) Amendment Bill 2017 is amended. As the attrition data shows, police in particular must be aware of the changes in the burden of evidence/proof. This should include clear examples of cases that constitute sexual violence in the proposed legislation, but which are not currently covered.

Community education and resources

As mentioned, ACTCOSS firmly supports the ACT Greens' intention to influence the community's understanding of consent, and therefore reduce rates of sexual violence. The Discussion Paper asks how best these changes should be communicated to the public, and ACTCOSS believes the government must allocate resources and funding to community awareness campaigns that specifically address the changes, and consent and respectful relationships more broadly.

A key point communicated to ACTCOSS by SHFPACT is that issues of consent are often framed as a young people's issue. But although young people are a vulnerable cohort, consent is a whole of community issue, which must be met with a whole of community education response. Consent and respectful relationships education should be a discussion within schools, universities, families, and workplaces. SHFPACT advises a combination of focused preparation materials as well as broader community education. The ANU Women's Department notes that consent education is most effectively delivered in-person.

ACTCOSS stresses the importance of specific resources for communities that may be vulnerable, or have differing social, cultural, comprehension or communication needs and abilities. Sexual violence most commonly affects women, and Aboriginal and/or Torres Strait Islander women, women with a disability, and culturally and linguistically diverse (CALD) women are significantly more vulnerable. Women with intersectional identities across these groups may face compounding vulnerability.

4 Willis et al, *Evaluation of the ACT Sexual Assault Reform Program: Final Report*, Australian Institute of Criminology, 2013, pp. 43-44.

5 *ibid*, pp. 21-22.

Particularly for Aboriginal and/or Torres Strait Islander women and culturally and linguistically diverse women, resources should be culturally safe and responsive. Aboriginal and/or Torres Strait Islander women experience significantly higher rates of sexual assault than the general population – they are up to 12 times more likely to be victims/survivors than non-Indigenous women.⁶ Resources developed for Aboriginal and/or Torres Strait Islander people should take into account intergenerational trauma, and should be developed in collaboration with Aboriginal leaders and community-controlled organisations. For CALD women, it is necessary to consider “variation in the extent to which [CALD] women have knowledge about the law, ability to access the Australian legal system, [and] willingness to engage with the police and other institutional actors”.⁷

Education resources for people with a disability should encourage healthy sexual relationships and work to ensure a full understanding of consent. Consultation with relevant national Disabled Peoples Organisations such as People With Disabilities Australia (PWDA), First Peoples Disability Network (FPDN) and Women With Disabilities Australia (WWDA), should be taken to ensure implementation avoids perpetuating justice outcomes where people with a disability are over-represented as both victims and perpetrators. People with a disability have a heightened vulnerability to sexual violence in part due to the perception that they are unable to have, or are uninterested in, sexual relationships.⁸ In Australia, more than 70% of women with a disability have experienced sexually violent encounters, and 90% of women with an intellectual disability have experienced sexual abuse.⁹ Men with an intellectual disability are also more likely to be victims/survivors than the general population.¹⁰

ACTCOSS notes that the government must particularly account for the differing and specific needs of people with intellectual disabilities, complex communication disabilities, or psychiatric disabilities. WWDA recommend all Australian states and territories,

...address the lack of accessible violence response services for women and girls with disabilities. These strategies should ensure that violence response services operate within a framework that requires them to consider the needs of persons with disabilities at each stage of the service delivery model.¹¹

6 Bainbridge et al, *Responding to Indigenous Australian Sexual Assault: A Systematic Review of the Literature*, SAGE, 2014, p. 1.

7 Australian Law Reform Commission, *Sexual Assault and Family Violence*, Australian Government, 2010, accessed 22 March 2014, <<https://www.alrc.gov.au/publications/24.%20Sexual%20Assault%20and%20Family%20Violence/prev-alence-sexual-violence>>.

8 P French, *Disabled Justice*, Queensland Advocacy Incorporated, 2007, Queensland, p. 22.

9 Women With Disabilities Australia, *Fact Sheet: Violence Against Women With Disabilities*, Women With Disabilities Australia, 2014, Tasmania, p. 1.

10 Australian Institute of Family Studies, *Sexual assault and adults with a disability*, 2008, Australian Government, accessed 22 March 2018, <<https://aifs.gov.au/publications/sexual-assault-and-adults-disability/prevalence-sexual-assault-adults-disabilities>>

11 Women With Disabilities Australia, *Fact Sheet: Violence Against Women With Disabilities*, Women With Disabilities Australia, 2014, Tasmania, p. 3.

Finally, ACTCOSS notes that education should be inclusive of LGBTQI Canberrans, as issues of consent and sexual violence are often exclusively considered within a heterosexual relationship model. ACTCOSS recommends the Women's Centre for Health Matters 2017 *Same Love, Same Rules* public awareness campaign on domestic violence in LGBTQI relationships as a useful resource.